

ADDITIONAL FEE:

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R E M A R K S

The Office Action issued May 19, 2004 has been received and its contents have been carefully considered.

Independent claims 19 and 23 have been slightly amended to render them more clear and definite as required by 35 USC §112 and to incorporate the subject matter of claims 31 and 32, respectively. Claims 31 and 32 have been canceled. These claims now recite that "various ones of said parts of the film structure" are provided with:

- (a) a material which is gas-permeable, and
- (b) a material which reacts with gases in the respective compartments [e.g., scavenging oxygen].

This material or materials are disposed in and/or on some of the parts of the film structure.

Claim 27 has also been amended to positively recite a method step (claim 27).

New dependent claims 33 and 34 have been added to recite also the use of material which passively manipulates

radiation applied to the tray [e.g., to resist, reflect, redistribute and/or absorb radiation].

The recitation of material "which passively manipulates radiation applied to the tray" is supported by the original specification inter alia on page 4, first full paragraph (lines 3-11).

As stated there, such a material, or "passive element", may be an aluminum film, for example, which modifies the microwave field to obtain even heating of the food. This element is "passive" in the sense that it does not undergo a change when radiation is applied. Such a radiation-influencing material may be provided in combination with a material which is gas-permeable and a "material which reacts with gases" in one or more compartments of the tray.

All of the previously filed claims of this application stand rejected over the following four newly cited references:

U.S. Patent No. 4,515,266 to Myers;

U.S. Patent No. 5,896,994 to Krebs;

U.S. Patent No. 5,901,848 to Gorlich et al.; and

International Patent Publication No. WO 99/10251 to Rooney et al.

These rejections are respectfully traversed because none of these references teach, individually or in combination, a food tray having various types of food in different compartments which are closed off and sealed by a film structure having disposed therein or thereon in various parts of the film structure:

(a) a material which is gas-permeable, and

(b) a material which reacts with gases in one or more compartments.

Claims 33 and 34, which are dependent from independent claims 19 and 23, respectively, go on to recite a material which "passively manipulates radiation."

As the Examiner clearly and carefully pointed out, the patent publications to Krebs and Rooney et al. both relate to the use of oxygen scavengers to reduce oxygen in a food package. Krebs discloses the use of a separate film strip to cover all or a part of the oxygen-sensitive food in the package. Rooney et al. teach a similar structure wherein the oxygen scavenging compositions are contained within impermeable "microcapsules" which may be broken or otherwise rendered oxygen permeable by the application of various "triggers" such as heat, mechanical pressure or

electromagnetic radiation. Thus, these materials permit the oxygen scavenging composition to be changed to the activated state as desired.

The patents to Gorlich et al. and Myers both relate to food packages covered, at least in part, by permeable membranes. In Gorlich et al. the membranes covering different compartments of the food tray have different permeability. In Myers, a single package is provided with a membrane which inhibits the inflow of air into the container but permits gases within the container to escape.

The independent claims of this application now recite a food package having various compartments in which different types of food are present, with one type of food being present in each compartment. The compartments are closed off by a film structure that is sealed to the tray around the openings of the compartment, such that a part of the film structure is present above each compartment.

According to the invention, parts of the film structure are provided with a material which reacts with gases in the respective compartments below it, and other (or the same) parts of the film structure are provided with a material which is gas-permeable.

For example, as noted above, oxygen in one or more compartments may be scavenged using a film strip and/or the compartments may be covered with a gas-permeable film structure.

While it is true that the cited patents to Myers, Krebs, Gorlich et al. and Rooney et al each disclose bits and pieces of applicants' invention, it would not be obvious to combine these references to achieve the benefits of the present invention. Krebs teaches the use of a scavenger strip that is easy to dispense without having to customize a film structure for each type of package. However, in order to modify Gorlich et al. in such a way as to arrive at the claimed invention, at least two separate films would have to be customized: one containing the oxygen scavenger for one of the compartments and one that does not contain such a scavenger for the other compartment.

The case law is quite clear that the mere existence of various elements of an invention in diverse references is not sufficient to render the invention obvious. As stated by the Court of Appeals for the Federal Circuit in Environmental Designs, Ltd. v. Union Oil of Cal., 218 USPQ 865, 870 (1983):

"That all elements of an invention may have been old (the normal situation), or some old and some new, or all new, is however, simply irrelevant. Virtually all inventions are combinations and virtually all are combinations of old elements. A court must consider what the prior art as a whole would have suggested to one skilled in the art."

On several occasions the Court of Customs and Patent Appeals has discussed the conditions that must be met to properly combine references in rejecting a claimed invention as being "obvious". As stated in In re Imperato, 179 USPQ 730, 732 (1973):

"With regard to the principal rejection, we agree that combining the teaching of Schaefer with that of Johnson or Amberg would give the beneficial result observed by appellant. However, the mere fact that those disclosures can be combined does not make the combination obvious unless the art also contains something to suggest the desirability of the combination. In re Bergel, 48 CCPA 1102, 292 F.2d 955, 130 USPQ 206 (1961). We find no such suggestion in these references". [Emphasis in original]

Similarly, as stated by the Patent and Trademark Office Board of Appeals in Ex parte Shepard and Gushue, 188 USPQ 536, 538 (1974):

"The mere fact each reference discloses some particular claimed elements is not sufficient for obviousness without some direction from the prior art."

Similarly, as stated by the Court of Customs and Patent Appeals in In re Regel, Buchel and Plempel, 188 USPQ 136, 139 (1975):

"As we have stated in the past, there must be some logical reason apparent from positive, concrete evidence of record which justifies a combination of primary and secondary references. In re Stemniski, supra. Further, as we stated in In re Bergel, 48 CCPA 1102, 1105, 292 F.2d 955, 956, 130 USPQ 206, 208 (1961):

'The mere fact that it is possible to find two isolated disclosures which might be combined in such a way to produce a new compound does not necessarily render such production obvious unless the art also contains something to suggest the desirability of the proposed combination.'

Similarly, as stated by the Court of Customs and Patent Appeals in In re Skoll, 187 USPQ 481, 483-4 (1975):

"We agree with appellant that the general rule applicable to a rejection based on a combination of references was stated by this court in In re Shaffer, 43 CCPA 758, 761-62 229 F.2d 476, 479, 108 USPQ 326, 328-29 (1956):

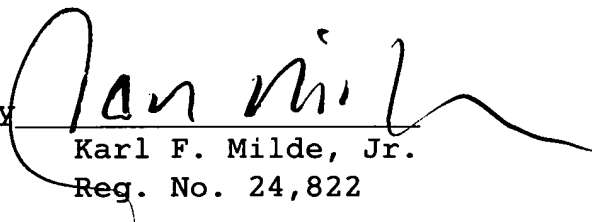
'[R]eferences may be combined for the purpose of showing that a claim is unpatentable. However, they may not be combined indiscriminately and to determine whether the combination of references is proper, the following criterion is often used: Namely, whether the prior art suggests doing what an applicant has done * * *. [I]t is not enough for a valid rejection to view the prior art in retrospect once an applicant's disclosure is known. The art applied should be viewed by itself to see if it fairly disclosed doing what an applicant has done.'" (emphasis supplied)

In each instance, the holding is that obviousness is not found merely because references could be combined to achieve a claimed invention. For an obviousness rejection to be proper under Section 103 of the Patent Statute, the combination must at least be suggested by the references.

Applicants' new dependent claims 33 and 34 add still another limitation to the food package and packaging method recited in independent claims 19 and 23, respectively. This combination also includes a material which passively manipulates radiation applied to the tray.

In conclusion, it is believed that independent claims 19 and 23 distinguish patentably over the references of record. This application is therefore believed to be in condition for immediate allowance. A formal Notice of Allowance is accordingly respectfully solicited.

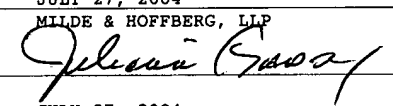
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MILDE & HOFFBERG, LLP
By 
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